United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

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DATE: December 16, 2011

TO : Alvin P. Blyer, Regional Director

Region 29

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Target Corporation

Case 29-CA-30713, -30861, -30804, -30880

512-5012-0125

The Region submitted this case for advice as to whether the Employer's rules governing the use of social media and the communication of confidential information would reasonably be construed to chill the exercise of Section 7 rights in violation of the Act. We conclude that the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by maintaining these overly broad rules.

FACTS

The Employer, Target Corporation, operates a chain of retail stores throughout the country, including a store located in Valley Stream, New York. The Union (United Food and Commercial Workers Union, Local 1500) lost an election in June 2011. In addition to filing objections to conduct affecting the results of the election, the Union filed a charge alleging, inter alia, that the policies set forth in the Employer's Handbook governing the use of social media and the communication of confidential information unlawfully restrict the exercise of the employees' Section 7 rights.

The Employer's social media policy is set forth in a section of its Handbook titled "Information Security." As relevant here, this section states:

Use technology appropriately

If you enjoy blogging or using online social networking sites such as Facebook and YouTube, (otherwise known as Consumer Generated Media, or CGM) please note that there are guidelines to follow if you plan to mention Target or your employment with Target in these online vehicles. . .

¹ Cases 29-CA-30713 and 29-CA-30861 were submitted for advice in connection with the discipline of a Target employee. The issues in those cases have recently been resolved by the parties pursuant to a non-Board adjustment.

• Don't release confidential guest, team member or company information. . . .

Communicating confidential information

You also need to protect confidential information when you communicate it. Here are some examples of rules that you need to follow:

- Make sure someone needs to know. You should never share confidential information with another team member unless they have a need to know the information to do their job. If you need to share confidential information with someone outside the company, confirm there is proper authorization to do so. If you are unsure, talk to your supervisor.
- Develop a healthy suspicion. Don't let anyone trick you into disclosing confidential information. Be suspicious if asked to ignore identification procedures.
- Watch what you say. Don't have conversations regarding confidential information in the Breakroom or in any other open area. Never discuss confidential information at home or in public areas.

Unauthorized access to confidential information: If you believe there may have been unauthorized access to confidential information or that confidential information may have been misused, it is your responsibility to report that information by contacting your supervisor (who should send an e-mail to Integrity@Tarqet.com) sending an e-mail to Integrity@Tarqet.com directly, or calling the Employee Relations and Integrity Hotline at 800-541-6383.

We're serious about the appropriate use, storage and communication of confidential information. A violation of Target policies regarding confidential information will result in corrective action, up to and including termination. You also may be subject to legal action, including criminal prosecution. The company also reserves the right to take any other action it believes is appropriate.

ACTION

We conclude that the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by maintaining overly broad rules governing the use of social media and the communication of confidential information.

An employer violates Section 8(a)(1) of the Act through the maintenance of a work rule if that rule would "reasonably tend to chill employees in the exercise of their Section 7 rights." The Board has developed a two-step inquiry to determine if a work rule would have such an effect. First, a rule is unlawful if it explicitly restricts Section 7 activities. If the rule does not explicitly restrict protected activities, it will violate the Act upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

Rules that are ambiguous as to their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful.⁵ In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they would not reasonably be construed to cover protected activity, are not unlawful.⁶

We conclude that although the Employer's policies governing the use of social media and the communication of confidential information were not promulgated in response to Section 7 activity and do not explicitly prohibit Section 7

² Lafayette Park Hotel, 326 NLRB 824, 825 (1998), enfd. 203
F.3d 52 (D.C. Cir. 1999).

³ Lutheran Heritage Village-Livonia, 343 NLRB 646, 647 (2004).

⁴ Id.

⁵ See University Medical Center, 335 NLRB 1318, 1320-1322 (2001), enf. denied in pertinent part 335 F.3d 1079 (D.C. Cir. 2003) (work rule that prohibited "disrespectful conduct towards [others]" unlawful because it included "no limiting language [that] removes [the rule's] ambiguity and limits its broad scope.")

⁶ See Tradesmen Intl., 338 NLRB 460, 460-62 (2002) (prohibition against "disloyal, disruptive, competitive, or damaging conduct" would not be reasonably construed to cover protected activity, given the rule's focus on other clearly illegal or egregious activity and the absence of any application against protected activity); Sears Holdings, Case 18-CA-19081, Advice Memorandum dated December 4, 2009 (lone reference to "disparagement" was made in context of prohibition against serious misconduct, such as use of obscenity, illegal drugs, and discriminatory language).

activity, various provisions of these policies are unlawful under the second part of the *Lutheran Heritage* test because they would reasonably be construed to prohibit Section 7 activity.

Initially, we find unlawful the section of the Employer's Handbook governing the use of social media titled "Use technology appropriately." This section, which instructs employees not to "release confidential quest, team member, or company information," is unlawful because it would reasonably be interpreted as prohibiting employees from discussing and disclosing information regarding their own conditions of employment, as well as the conditions of employment of employees other than themselves -- activities that are clearly protected by Section 7. The Board has long recognized that employees have a right to discuss wages and conditions of employment with third parties as well as each other and that rules prohibiting the communication of confidential information without exempting Section 7 activity inhibit this right because employees would reasonably interpret such prohibitions to include information concerning terms and conditions of employment. 7 Additionally, we find unlawful the provisions of the Handbook included under "Communicating confidential information" which instruct employees "never to share confidential information with another team member unless they have a need to know the information to do their job;" to talk to their supervisor if they are unsure; and not to have discussions regarding confidential information in the breakroom, at home or in open areas and public places. 8 The

See, e.g., Bigg's Foods, 347 NLRB 425, 425 fn.4 (2006) (confidentiality rule prohibiting employees from discussing their own or their fellow employees' salaries outside the company unlawful because employees would reasonably construe it as prohibiting Section 7 activity); Cintas Corp., 344 NLRB 943, 943 (2005) (confidentiality rule's unqualified prohibition of the release of "any information" regarding its employees would reasonably be construed by employees to restrict discussion of wages and other terms and conditions of employment with their fellow employees and with the union and was therefore unlawful); University Medical Center, 335 NLRB at 1320, 1322 (rule prohibiting the release or disclosure of confidential information regarding fellow employees unlawful because employees "might reasonably perceive terms and conditions of employment, including wages, to be within the scope of the broadly-stated category of 'confidential information' about employees").

See Flamingo Hilton-Laughlin, 330 NLRB 287, 288 (1999) (finding unlawful rule prohibiting employees from revealing "confidential information regarding our customers, fellow employees, or Hotel business"); IRIS U.S.A., 336 NLRB 1013, 1013 (2001) (finding unlawful rule that instructs employees

broad prohibitions included in these rules would similarly be construed by employees as prohibiting them from discussing information regarding their terms and conditions of employment. Indeed, the rules explicitly prohibit employees from having such discussions in the breakroom, at home, or in public places -- virtually everywhere such discussions are most likely to occur. Consequently, because the provisions of both sections of the Handbook fail to include any definition of what the Employer considers to be "confidential," or any limiting language or language exempting Section 7 activities from their coverage, the provisions violate Section 8(a)(1).

Finally, we find unlawful the provisions in the Employer's Handbook which threaten employees with discharge or criminal prosecution for failure to report unauthorized access to or misuse of confidential information. That section would be construed as requiring employees to report a breach of the rules governing the communication of confidential information set forth above. Since those rules are unlawful, the reporting requirement is also unlawful. 10

We do not, however, find unlawful the section in the Handbook that admonishes employees to "[d]evelop a healthy suspicion[,]" cautions against being "[b]eing tricked into disclosing confidential information[,]" and urges employees to "be suspicious if asked to ignore identification procedures." Although this section also refers to confidential information, it merely advises employees to be cautious about unwittingly divulging such information and does not proscribe any particular communications. Further, once the offending "confidentiality" provisions are rescinded, this section would not reasonably be construed to apply to Section 7 activities, particularly since it

to keep information about employees strictly confidential and to resolve any doubts about the confidentiality of information in favor of confidentiality).

⁹ See Freemont Manufacturing Co., 224 NLRB 597, 603-604 (1976) (finding overly broad rule prohibiting employees from "[m] aking any statement or disclosure regarding company affairs, whether express or implied as being official, without proper authorization from the company").

¹⁰ Cf. Bloomington-Normal Seating Co., 339 NLRB 191,191 n.2 (2003) (employer's invitation to employees that they inform it of protected card solicitations by other employees unlawful because of the potential for chilling legitimate union activity); Eastern Main Medical Center, 277 NLRB 1374, 1375 (1985) (statement by employer urging its employees to report to the employer if they have been harassed or pressured into signing cards was overly broad and unlawful).

specifically ties confidential information to "identification procedures."

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by maintaining overly broad rules governing the use of social media and the communication of confidential information.

B.J.K.